United States Court of Appeals

for the Second Circuit

PETITIONER'S BRIEF

No. 75-4215

United States Court of Appeals
FOR THE SECOND CIRCUIT

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

A. LASAPONARA & SONS, INC., A WHOLLY OWNED SUBSIDIARY OF ERE INDUSTRIES, INC. and ERE INDUSTRIES, INC.,

Respondents.

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P/S

On Application for Enforcement of an Order of The National Labor Relations Board

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

JOHN S. IRVING,
General Counsel,

JOHN E. HIGGINS, JR.,
Deputy General Counsel,

ELLIOTT MOORE,
Deputy Associate General Counsel,

National Labor Relations Board.

JOHN H. FERGUSON,
DAVID S. FISHBACK,
Attorneys,

National Labor Relations Board.
Washington, D.C. 20570

THE CASILLAS PRESS, INC.—1717 K Street, N. W.—Washington, D. C.—223-1220

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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

STATEMENT OF THE ISSUES PRESENTED

1. Whether the Company violated Section 8(a)(5) and (1) of the National Labor Relations Act by withdrawing recognition from the Union and instituting unilateral changes in employment conditions.

2. Whether the Company violated Section 8(a)(1) of the Act by various interrogations and threats of reprisals.

3. Whether the Company violated Section 8(a)(1) of the Act by discharging certain employees because of protected concerted activity.

4. Whether the Company violated Section 8(a)(3) and (1) of the Act by discriminatorily refusing to rehire a former employee.

STATEMENT OF THE CASE

This case is before the Court upon the application of the National Labor Relations Board, pursuant to Section 10(e) of the Act as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Sec. 151, *et seq.*), for enforcement of its order against A. Lasaponara & Sons, Inc., a wholly-owned subsidiary of ERE Industries, Inc. (herein "the Company"), and ERE Industries, Inc. The Board's decision, by Chairman Murphy and members Fanning and Jenkins, issued on June 30, 1975 and is reported at 218 NLRB No. 168 (A. 3-47).[1] This Court has jurisdiction over the proceedings, the unfair labor practices having occurred in Oriskany, New York.

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1 "A." references are to pages of the printed Appendix. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

I. THE BOARD'S FINDINGS OF FACT

A. The Business of the Company; the Union is recognized by the Company; the Company subsequently disregards that recognition.

The Company is engaged in the manufacture and wholesale distribution of cheese and related products (A. 4-5; 114). In the autumn of 1973, a majority of the employees in an appropriate bargaining unit at the Company's Oriskany, New York plant, signed cards authorizing the Mechanics Educational Society of America, AFl-CIO, (herein "the Union") to be their representative for the purpose of collective bargaining (A. 6; 52). On December 3, 1973, the Union requested bargaining with the Company. On December 5, it filed a petition for a representation election with the National Labor Relations Board, and two days later sent a letter to the Company informing it of the names of the employees on the Union's organizing committee (A 6-7; 53, 58-59, 154, 156, 157). The Company's president, Joseph Lasaponara, contacted Thomas Zappone, president of the Oneida Development Corporation (herein "ODC") and asked him to discuss the organizational effort with the Union. The ODC had been instrumental in bringing the Company to Oriskany and had the power to approve or disapprove certain financial transactions of the Company (A. 7-8; 59, 74, 115).

On December 10, 1973, Zappone met with Union officials James Kozma and James DeBella. He explained the relationship of the ODC to the Company and told them that the Company was engaged in merger discussions with another corporation. He further told them that a representation election or union at that particular time could jeopardize the negotiations and cause the loss of the bargaining unit jobs (A. 8; 60). Kozma and DeBella were sympathetic to the situation as outlined by Zappone, but added that they had a responsibility to represent the people

who had joined the Union. They suggested that a resolution of the matter satisfactory to all concerned could be arranged (A. 8; 60, 74).

On December 12, 1973, Kozma and DeBella met with Zappone and Lasaponara. Lasaponara assured Kozma and DeBella that he had no objection to the Union, but felt that an election at that time could affect production and upset the merger negotiations (A. 8; 61, 75). Kozma and DeBella informed Lasaponara that, having secured authorizations cards of a majority of the employees, an election was not necessary to secure union recognition. They proposed voluntary recognition based on the authorization cards and an immediate 25¢ per hour wage increase, with a full contract to be formalized at a later date. Lasaponara asked what the employees wanted in a contract, and DeBella told him. Lasaponara told the Union officials that he would consider the proposal and get back to them (A. 9; 60-61, 75).

Two days later, on December 14, Lasaponara met with Kozma and DeBella. Lasaponara said that he was not prepared to sign a contract at that time, but would grant a 20¢ increase if that increase was taken into account when contract negotiations began. The Union agreed, provided that the Company continue the past practice of granting quarterly wage increases and the availability of other existing benefits. In the expectation that the Company's merger negotiations would be completed by April 1, the parties further agreed that contract bargaining would not begin until that date. In return, the Union agreed to withdraw its petition for an election with the National Labor Relations Board. The meeting ended with an agreement to formalize the recognition in writing at a subsequent meeting with Plant Manager Anthony Fazzino (A. 9-11; 61-62, 75-77).

On December 20, 1973, the Union officials, along with employees Eva Wilson, Peter Muraca, William Bonville, and Robert Kraeger, met with Plant Manager Fazzino. At that meeting, Kozma signed, and several employees witnessed, the recognition document which was then given to Fazzino for transmittal to Lasaponara (A. 11; 62-64, 77). The "recognition agreement" read as follows:

> Effective April 1, 197[4], Lasaponara & Sons, Inc. will recognize the Mechanics Educational Society of America, AFL-CIO as the sole collective bargaining agency on behalf of the employees employed at its plant located on Base Road, Oriskany, New York, for rates of pay, wages, hours of work and any other conditions of employment (A. 11; 158).

Fazzino reaffirmed the 20¢ wage increase and assured Kozma that he would forward the recognition agreement to Lasaponara for his signature (A. 12; 62-64, 77). The Union advised Fazzino that employee Eva Wilson was chairman of the union shop committee, and Fazzino agreed to take up any problems in the plant with her (A. 12; 133, 64). Fazzino was also given DeBella's phone number in the event further discussions were necessary (A. 12; 64).

Pursuant to the oral agreement of December 14, the Union then withdrew the representation petitions that it had filed with the National Labor Relations Board and the New York State Labor Department. On December 24, the Company instituted the agreed-to 20¢ wage increase (A. 12; 62-64, 67, 89, 159, 161).

In early February, DeBella spoke with Fazzino about employee complaints concerning health insurance coverage and the failure to grant some employees their automatic wage increases (A. 13; 78). Later that month, several female employees, two of whom were on the Union committee,

complained to DeBella that they had been laid off and were to be replaced with men. DeBella contacted Fazzino, and informed him of the Union's view that the layoffs appeared to be unlawful. Fazzino discussed the matter with Lasaponara, and the layoffs were rescinded (A. 14; 79-80, 122-123, 157).

On March 5, DeBella spoke with Lasaponara about grievances, employee problems concerning insurance, automatic wage increases, and a "proper rate" for one employee. Lasaponara suggested that DeBella put the grievances in writing. DeBella did so, delivering the letter to Fazzino on March 8 for conveyance to Lasaponara (A. 14; 80-81, 127, 160).

In the meantime, Lasaponara had not signed the recognition agreement that had been agreed to in December. When Union Representative DeBella inquired as to the signing in early January, Plant Manager Fazzino told him that the intervening holidays had delayed the transmittal of the document to Lasaponara, and that Fazzino would get it to him. On February 5, DeBella again brought up the matter of the document with Fazzino. Fazzino said that Lasaponara had been very busy and that that was why the executed agreement had not arrived. The next day, DeBella contacted ODC President Zappone and asked him to help arrange a meeting with Lasaponara. Zappone agreed, but later told DeBella that he was unable to do so (A. 13; 77-79).

Later on, DeBella again spoke with Zappone, who told him that ERE Industries was in the process of purchasing the ownership interest in the Company. Zappone also gave DeBella the telephone number of Frank Oddi, president of ERE, who was slated to become president of A. Lasaponara & Sons, Inc., when the sale of the stock was completed (A. 14-15; 82). On March 27, Oddi spoke to the Company's employees and informed them that he would be the new president of the Company and that the benefits

package of the parent company, ERE, would be extended to them, including life and health insurance, vacation, and paid holidays (A. 15; 53-54, 90-91, 142-143). In response to these developments, DeBella placed a telephone call to Oddi at ERE's main office in Medford, Massachusetts. He was unable to reach Oddi, but left a message for Oddi to return the call. Oddi was informed of the call, knew it was from the Union, but did not return it (A. 15; 82-83, 149-150).

Consequently, on April 10, the Union filed charges with the Board complaining of the Company's bypassing and ignoring the duly-recognized representative of its employees (A. 3; 73, 151). On April 23, ERE Industries assumed ownership of the Company. On May 1, the changes promised by Oddi began to be put into effect (A. 15-16; 53-54, 141-143).

B. The Company coercively interrogates and threatens its employees

Paralleling the events described above were various instances of supervisory personnel threatening and coercively interrogating employees. In November, when the Union first began organizing, Supervisor John Kosh told employee Bartle that the Company would not permit a Union to come in (A. 18-19; 106). Shortly after the Union requested bargaining in early December, President Lasaponara called his employees into his office in groups of two and asked them why they thought they needed a union (A. 19; 103, 125). During one of these meetings he told employees Wilson and Peck that there would be no raises as long as the employees were dealing with the Union (A. 19; 88). In another meeting he told employees Bartle and Wyckoff that if they "would vote no on the Union", he would continue to give them the benefits to which they were entitled (A. 20; 106). In meeting with employees Bonville and Radley and Kraeger and Culver, Lasaponara warned, "if you f - - - me, I will f - - - you" (A. 19-20; 103, 194).

On January 11, Plant Manager Fazzino spoke with employees Karen Marcelletta and Linda Smith in his office, told them that since they "wanted to treat him bad that he was going to treat us the same way." He then asked them who had signed Union cards. When they told him they did not know, he responded that he did know, and asked if they and Pete Muraca had started the Union. They answered in the negative, and Fazzino answered that he knew who started it (A. 22; 100-102). Then about March 1, Fazzino attempted to find out from employee Bartle "if the union meetings had taken place". Bartle denied there had been any meeting scheduled (A. 22-23; 107).

C. The Company responds to its employees' concerted activity relative to working on Palm Sunday with a threat and the subsequent discharge of six employees.

About March 29, Shop Committee Chairman Wilson apprised Union Representative Kozma that employees were upset about the Company's scheduling Palm Sunday as a day of work and sought his advice about what could be done (A. 65). Kozma prepared a petition, 11 employees signed it, and on Friday, April 5, Wilson presented the petition to Plant Manager Fazzino (A. 24; 56-57, 65, 91, 96-97). The petition stated (A. 24; 155):

> WE, THE UNDERSIGNED MEMBERS OF MECHANICS EDUCATIONAL SOCIETY OF AMERICA, AFL-CIO, (M.E.S.A., AFL-CIO), EMPLOYEES OF LASAPONARA & SONS, INC. HAVE BEEN ADVISED THAT PALM SUNDAY, APRIL 7, 1974, HAS BEEN SCHEDULED AS A DAY OF WORK.
>
> Since this is a religious holiday that is important to us, we request that this schedule be rescinded.

> In the event that this schedule is not changed, you are advised that we will not report for work on Palm Sunday, April 7, 1974, but will report to work on Monday, April 8, 1974.

Fazzino crumpled the petition and called Wilson a "troublemaker" (A. 23, 25; 91, 96-97). He demanded to know which of the employees would work and threatened to turn over the names of those who failed to work to the new owner (A. 25, 28; 91, 96-97). Eva Wilson, Bonville, Kraeger, Peck, Bartle, Richard Hayes, and Douglas Hitts followed up on their announced intention to strike and did not come to work Palm Sunday. They returned to work the next day, and nothing was said or done to them. Thereafter, Hitts was terminated for reasons not relevant here (A. 29). Then, on June 7, two months after the walkout, the six employees remaining were discharged on the ground that they had refused to work on Palm Sunday (A. 29-30; 91-92, 97, 103-104, 105, 107).

D. The Company discriminatorily refuses to rehire Peter Muraca.

Peter Muraca had been one of the more prominent proponents of the Union in November and December, having been a member of the employee committee in attendance at the December 20 meeting with Fazzino and having been later accused by Fazzino of being an instigator of the Union activity (A. 25-26, 22; 62, 100, 102, 157). Muraca's employment with the Company ceased shortly after the December 20 meeting (A. 26; 112). On May 27, sometime after the Union filed unfair labor practice charges against the Company with the Board, Muraca sought reemployment with the Company. Fazzino told him that the Company needed people, but that he [Muraca] would have to wait "until this union thing gets settled." When Muraca asked what that had to do with him, Fazzino

replied "you got me in trouble" and indicated that as a result "some guy from the [National Labor Relations Board] had a meeting" with him and Oddi. Fazzino told Muraca that he would call him (A. 26-27; 112-113). However, Muraca received no call, and went to Fazzino again on June 10. Again, Fazzino admitted that the Company needed employees, but that he would have to speak with Oddi before Muraca could be offered a job. Fazzino again said he would call Muraca, but never did (A. 27; 113).

II. THE BOARD'S CONCLUSION AND ORDER

Based on the foregoing facts, the Board found that the Company violated Section 8(a)(5) and (1) of the Act by making unilateral changes in conditions of employment, thus refusing to bargain with the exclusive representative of its unit employees (A. 35-36, 17); violated Section 8(a)(1) by threatening and coercively interrogating various employees between November 1973 and April 1974 (A. 36; 18-23, 43 n. 2); violated Section 8(a)(1) by discharging employees Eva Wilson, Bonville, Kraeger, Peck, Bartle, and Hayes because of their protected concerted activity (A. 32, 35); and violated Section 8(a)(3) and (1) by refusing to hire former employee Muraca because of union activities (A. 27-28, 35).[2]

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[2] Chairman Murphy dissented from the Board's findings to the extent that she would have found no violation in Fazzino's April 5 statement to Eva Wilson that she was "a troublemaker." The Chairman concurred in the Board's decision in all other respects (A. 44-45).

The Board's order requires the Company to cease and desist from the unfair labor practices found and from "in any other manner interfering with, restraining, or coercing" its employees in the exercise of their Section 7 rights (A. 36-37). Affirmatively, the Board's order requires the Company to bargain upon request with the Union "as the exclusive collective bargaining representative of its employees in the unit . . . and embody any understanding reached in a signed agreement" (A. 37); to rescind, if requested by the Union, the unilateral changes (A. 37); to offer Eva Wilson, Bonville, Kraeger, Peck, Bartle, and Hayes immediate and full reinstatement to their former or equivalent positions, and to make them whole (A. 38); to offer Muraca employment to the position he was discriminatorily denied or its equivalent and make him whole (A. 37-38); and to post appropriate notices (A. 38).

ARGUMENT

I. SUBSTANTIAL EVIDENCE ON THE RECORD TAKEN AS A WHOLE SUPPORTS THE BOARD'S FINDING THAT THE COMPANY VIOLATED SECTION 8(a)(5) AND (1) OF THE ACT BY UNILATERALLY CHANGING CONDITIONS OF EMPLOYMENT AND WITHDRAWING RECOGNITION FROM THE UNION.

It is well-settled that a bargaining relationship established by voluntary recognition must be permitted to continue for a reasonable period and may not be broken off at will. See *N.L.R.B. v. Broad Street Hospital*, 452 F.2d 302 (C.A. 3, 1971); *N.L.R.B. v. San Clemente Publishing Corp.*, 408 F.2d 367 (C.A. 9, 1969). It is equally well-settled that unilateral changes, when made in disregard of a duly-recognized collective bargaining representative, violate the Act. *N.L.R.B. v. Katz*, 369 U.S. 736, 743-744 (1962); *N.L.R.B. v. General Electric*, 418 F.2d 736, 746 (C.A. 2, 1969), cert. denied, 397 U.S. 965.

In the instant case the Company concededly denies its obligation to bargain with the Union and concededly made unilateral changes in the terms and conditions of employment without consulting the Union. The only issue here is whether the Union was in fact the recognized representative of the employees and, as such, entitled to continued recognition and an opportunity to bargain about proposed changes. The Board determined that it was the recognized representative. In making this determination the Board properly relied on circumstantial as well as direct evidence, and its inferences must stand if reasonable and supported by substantial evidence on the record as a whole. *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474, 488 (1951). A reviewing court may not "displace the Board's choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it *de novo*." *N.L.R.B. v. Walton Mfg. Co.*, 369 U.S. 404, 405 (1962).

As shown in the Statement, the Union had secured authorization cards of a majority of the unit employees when it filed its petition for a Board election in early December. The Company told the Union that it was desirous of avoiding the disruption of an election and other extensive union activity which could have an adverse affect on its merger negotiations. As a result the Union suggested that the Company grant voluntary recognition, thus eliminating the necessity of an election, and that it put off "formal" recognition and actual contract negotiations until April 1 – the time when the parties estimated that merger negotiations would be completed. An interim wage increase was also proposed. The Company agreed to this resolution on December 14. This voluntary, oral recognition of the Union by the Company was as binding as any other form of recognition, and it bound the Company to bargain with the Union. *N.L.R.B. v. Broad Street Hospital and Medical Center, supra*, 452 F.2d at

304-305.[3] Indeed, the wage increase was granted, and the Union thereafter continued to represent the interests of the employees before the Company throughout the winter (*supra*, pp. 5-6).

When confronted, shortly before April 1, with Oddi's announcement that ERE Industries was to take over ownership of the Company and that new benefits would be granted, the Union sought to get in touch with Oddi. Oddi, however, refused to return the Union's call. Inasmuch as the Company continued its operations in the same manner with the same employees following the transfer of ownership to ERE Industries, it cannot seriously be contended that the change in ownership affected the Company's bargaining obligation. See *N.L.R.B. v. Burns Security Services*, 406 U.S. 272, 279 (1972). And since the parties' oral agreement was founded on a mutual recognition of the Union's majority status and contemplated that the completion of the Company's merger negotiations would be followed by formal recognition and the commencement of contract negotiations (*supra*, p. 4), the Board reasonably concluded (A. 16-17) that Oddi's ignoring of the Union and subsequent implementation of unilateral changes was tantamount to withdrawal of recognition from the Union. Since the Union had properly been recognized by the Company, this conduct constituted a violation of Section 8(a)(5) and (1). See cases, *supra*, p. 11.

The Company contends that it granted recognition contingent only on its failure to transfer ownership. This contention, however, is based solely on testimony of Lasaponara that the Board declined to credit, (A. 10 n. 11) and is contrary to the testimony credited by the Board. As

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[3] Thus, contrary to the Company's contention before the Board, Lasaponara's failure ever to sign a document which put his oral agreement in writing had no effect on the binding nature of that agreement.

this Court has recognized, credibility resolutions are for the trier of fact, and the Board should not be upset on review absent extraordinary circumstances not present here. *N.L.R.B. v. A & S Electronic Die Corp.*, 423 F.2d 218, 220 (C.A. 2, 1970), cert. denied, 400 U.S. 833; *N.L.R.B. v. Warrensburg Board & Paper Corp.*, 340 F.2d 920, 922 (C.A. 2, 1965).[4]

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[4] At any rate, as the Administrative Law Judge recognized in assessing the inherent probability of the testimony (A. 10, n. 11), the factors relied upon by the Company to attack this credibility finding are far from compelling. The Company's assertion that the Union agreed to recognition contingent only on failure of Lasaponara to sell – thereby deciding to "gamble" that the negotiations would fall through – does not make sense, since, under established successorship doctrine (see *Burns, supra*), the sale of the business would not, in and of itself, deprive the Union of the right to continued recognition by the new owner. Rather, the Union's acceptance of voluntary oral recognition and its willingness to leave formal recognition and formal contract negotiations in abeyance until after the merger talks were expected to be completed was the logical course for it to follow in light of the Company's representations that any other course might jeopardize jobs. Likewise, the Company's agreement to extend that recognition was the logical course for it to follow in view of the Union's statement that it could not walk away from its responsibility to represent its members.

The Company's reliance on testimony of Union officials to the effect that they expected to eventually negotiate with Lasaponara is misplaced and does not support the Company's contention that Union officials understood that recognition was contingent on the Lasaponara family's retaining control of the business. Such testimony reveals nothing more than the Union's understanding that merger talks were going on and, as stated by Union Representative DeBella, that "merger doesn't necessarily mean that the present principals are out. The principals can continue as evidenced here" (A. 85). Indeed, Lasaponara and Fazzino continued after April 23 in top management positions (A. 5-6; 54-55, 126).

II. SUBSTANTIAL EVIDENCE ON THE RECORD TAKEN AS A WHOLE SUPPORTS THE BOARD'S FINDINGS THAT THE COMPANY VIOLATED SECTION 8(a)(1) OF THE ACT BY COERCIVE INTERROGATIONS OF ITS EMPLOYEES, THREATENING THE WITHHOLDING OF BENEFITS, AND THREATENING TO RETALIATE FOR THEIR PROTECTED ACTIVITIES.

Employer interrogations of employees that are "calculated to frustrate the union's organization campaign by instilling fear of reprisals" are violative of Section 8(a)(1). *N.L.R.B. v. L.E. Farrell Co.*, 360 F.2d 205, 207 (C.A. 2, 1966); *N.L.R.B. v. Milco, Inc.*, 388 F.2d 133, 137 (C.A. 2, 1968). Interrogations conducted by those high in the Company's hierarchy in the "unnatural formality" of executive offices, particularly when unaccompanied by any assurance against reprisals, are properly found by the Board to be unlawful. *N.L.R.B. v. Gladding Keystone Corp.*, 435 F.2d 129, 132-133 (C.A. 2, 1970).

Here, Company President Lasaponara called the employees into his office in pairs and asked them why they wanted a union. Not only did he not assure them that his purpose was benign, but also he went on to threaten some of them with the withholding of raises and benefits as long as the Union was in the picture. Such threats compound the violation. *N.L.R.B. v. International Metal Specialties, Inc.*, 433 F.2d 870, 871 (C.A. 2, 1970), cert. denied, 402 U.S. 907; *Federation of Union Representatives v. N.L.R.B.*, 339 F.2d 126, 129-130 (C.A. 2, 1964). Indeed, Lasaponara's abusive comments to Bonville and Radley and Kraeger and Culver that he would "f - - -" them (A. 19-20; 103, 104) were crass threats of general retaliation. These statements to the effect that union activity "would mean harsher working conditions and strained relations between employees and supervisory personnel" were unquestionably illegal. *Snyder Tank Corp. v. N.L.R.B.*, 428 F.2d 1348, 1349-1350 (C.A. 2, 1970), cert. denied, 400 U.S. 1021.

Plant Manager Fazzino continued this tactic. He threatened Marcelletta and Smith in the same manner and asked them who had signed cards and who had started the Union, following those questions with the statement that he already knew the answers. Later on, Fazzino interrogated Bartle as to whether there had been Union meetings. These actions also violated Section 8(a)(1). See *N.L.R.B. v. L.E. Farrell Co., supra*, 360 F.2d at 207; *N.L.R.B. v. Long Island Airport Limousine Service*, 468 F. 2d 292 (C.A. 2, 1972); *N.L.R.B. v. S & H Grossinger's*, 372 F.2d 26, 28 (C.A. 2, 1967); *N.L.R.B. v. Gerbes Supermarkets, Inc.*, 436 F.2d 19, 21 (C.A. 8, 1971).

Finally, Fazzino publicly accused Eva Wilson, head of the Union's shop committee, of being a "troublemaker" after she presented the employees' grievances concerning the work scheduled for Palm Sunday. The Board reasonably concluded that this deprecation of a union leader in front of other employees contained an implied threat of reprisal for engaging in legitimate activity. See *Hribar Trucking, Inc.*, 166 NLRB 745, 747 (1967), modified on other grounds, 406 F.2d 854 (C.A. 7, 1969) (employer told employees to stay away from union steward because steward "was a troublemaker"); *Goodyear Aircraft Corp.*, 63 NLRB 1340, 1353 (1945) (employer accused union steward of being a "troublemaker" at the time of the submission of a grievance). Similarly, Supervisor Kosh's flat statement, made at the beginning of the Union's organizational campaign, that the Company would not permit the Union to come in contained a veiled threat of reprisal and suggested the futility of organizing, thereby interfering with the employees' organizational rights; in view of Kosh's status as a supervisor, the Board properly found that this statement violated Section 8(a)(1) of the Act. *Irving Air Chute Co., Inc. v. N.L.R.B.*, 350 F.2d 176, 179 (C.A. 2, 1965).

III. SUBSTANTIAL EVIDENCE ON THE RECORD TAKEN AS A WHOLE SUPPORTS THE BOARD'S FINDING THAT THE COMPANY VIOLATED SECTION 8(a)(1) OF THE ACT BY DISCHARGING EMPLOYEES FOR ENGAGING IN CONCERTED ACTIVITIES.

Section 7 of the Act guarantees employees the right to engage in "concerted activities for the purpose of collective bargaining or other mutual aid or protection." Section 8(a)(1) of the Act implements this guarantee by making it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7." It is settled law that the discharge of employees for engaging in protected concerted activities violates Section 8(a)(1). See *N.L.R.B. v. Washington Aluminum Co.*, 370 U.S. 9, 17 (1962); *N.L.R.B. v. J.I. Case Co.*, 198 F.2d 919, 922 (C.A. 8, 1952), cert. denied, 345 U.S. 917; *First National Bank of Omaha v. N.L.R.B.*, 413 F.2d 921, 924-925 (C.A. 8, 1969); *Shelley and Anderson Furniture Co. v. N.L.R.B.*, 497 F. 2d 1200, 1202-1203 (C.A. 9, 1974); *N.L.R.B. v. Leprino Cheese Co.*, 424 F.2d 184, 186 (C.A. 10, 1970), cert. denied, 400 U.S. 915.

The action taken by the employees here falls squarely within the protective reach of Section 7. Two days before the religious observance of Palm Sunday the employees formally requested rescission of the scheduled holiday work and stated their intention not to work that day. Fazzino rejected the employees' petition, and told them that he would turn the names of anyone not working to the new owner. The employees who did not report for work on Palm Sunday returned to work on Monday, but were subsequently discharged some two months later, admittedly because they had engaged in that one-day strike. Thus, the employees' action was clearly "concerted" within the meaning of Section 7; it was for the employees' "mutual aid and protection;" and the Company interfered with or restrained the exercise of the activity, in violation of Section 8(a)(1) by discharging the employees for this reason.

While it is true that Section 7 does not immunize all employment related activities without regard to the means employed or the objectives sought, the exceptions to the broad protections have been narrowly defined.[5]

The Company contended below that the strike was unprotected because of the financial damage that it could have done to the Company. The case relied upon by the Company, *N.L.R.B. v. Marshall Car Wheel & Foundry Co.*, 218 F.2d 409, 411 (C.A. 5, 1955), is easily distinguishable. In *Marshall*, a walkout was deliberately planned to occur "when molten iron . . . was ready to be poured off, and [when] a lack of sufficient help to carry out the critical pouring operation might well have resulted in substantial property damage." Here, on the other hand, the Company was informed of the intention to strike two days in advance, and the physical plant was not put in any danger. Compare *N.L.R.B. v. Morris Fishman & Sons, Inc.*, 278 F.2d 792, 795-796 (C.A. 3, 1960) (walkout announced in the morning prior to the start of work found to be protected, the court noting that while in *Marshall* the stoppage was "deliberately timed to cause maximum damage", in *Fishman* there was "no threat of aggravated physical injury to the plant").

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[5] See, for example:

Objective contrary to federal statute: *American Rubber Products Corp. v. N.L.R.B.*, 214 F.2d 47, 50-52 (C.A. 7, 19[illegible]) (strike to compel wage increase which would have violated government regulation[illegible]

Major violence or misconduct: *Southern Steamship Co. v. N.L.R.B.*, 316 U.S. 31 (1942) (strike which constituted mutiny under federal criminal law);

Other "indefensible" conduct: *N.L.R.B. v. Reynolds & Manley Lumber Co.*, 212 F. 2d 155 (C.A. 5, 1954) (walking off job so as to create dangerous situation); *N.L.R.B. v. Sands Mfg.*, 306 U.S. 332 (1939) (strike in breach of collective bargaining agreement); *N.L.R.B. v. Local 1229, IBEW*, 346 U.S. 464 (1953) (showing unnecessary disloyalty to employer through published attack on employer's product).

A much closer situation to that presented in the instant case is that considered by the Tenth Circuit in *N.L.R.B. v. Leprino Cheese Co., supra,* 424 F.2d 184, 186, where the employees' action in walking off the job in a cheese processing plant on Christmas Day, after being told that they would have to work longer than anticipated and would not be paid double time, was found to be protected. In *Leprino,* as here, the employer was able to do the day's work with available help. The employees here made the situation less difficult than those in *Leprino* by informing management in advance of their plan. And in *Leprino,* as here, there was no allegation of potential damage other than pecuniary loss attributable to lost produc- n that day. This kind of loss does not make a strike unprotected. As the court said in *Leprino*, 424 F.2d at 187:

> In any event a strike as an economic weapon usually results in loss to both the employer and the employees. The economic effect of a strike to aid employees in their bargaining is a necessary tool in the c ntemplation of the National Labor Relations Act, as amended. Thus, the exercise of a right guaranteed by the Act which results in such a loss to the employer is not cause for discharge.

Accord: *N.L.R.B. v. M & M Bakeries,* 271 F.2d 602, 605 (C.A. 1, 1959).

Nor can the Company justify the discharges on the ground that the work stoppage was "partial", "intermittent", or "recurrent", and therefore unprotected. *Valley City Furniture Co.,* 110 NLRB 1589, 1594-1595, enf'd, 230 F.2d 947 (C.A. 6, 1956). It is only when employees adopt a strategy of continuing work stoppages or refusals to perform assigned tasks that their activity loses its protected status; the broad guarantees embodied in Section 7 do not authorize an employer to discharge employees for engaging in a single, concerted work stoppage of limited duration in protest over working conditions. See *First National Bank of Omaha, supra,* 413 F.2d at 924; *N.L.R.B. v. Leprino Cheese Co., supra,* 424 F.2d at 186-

187. The law is clear that a strike need be of no particular duration. Thus, here, as in *First National Bank* and *Leprino*, one-time walkouts in protest over working hours were protected, and no more than in those cases may the employees' conduct here be assumed to presage continual guerrilla tactics – particularly since the Company admittedly never inquired of the striking employees whether they intended to walk out in the future as a means of protesting scheduled holiday work (A. 134-135).[6]

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[6] In view of the Board's finding that the employees' conduct was protected activity, it did not find it necessary to decide whether the fact that the Company not only permitted the employees to return to work, but also allowed them to continue working for two months, without anything being said to them or done to them, warranted a finding that the Company had condoned their conduct. However, the Board indicated that, were it necessary to decide, it would find a condonation, thus making the discharges unlawful even if the strike were unprotected (A. 32, n. 30). See *Confectionery* and *Tobacco Drivers and Warehousemen's Union, Local 805 v. N.L.R.B.*, 312 F.2d 108, 113 (C.A. 2, 1963) ("After a condonation the employer may not rely upon prior unprotected activities of employees to . . . discriminate against them.").

Before the Board, the Company argued that there was no condonation because the Company never affirmatively or explicitly manifested its forgiveness of the employees' conduct. This argument overlooks that "the condonation principle . . ., reflecting a clear public interest in the prompt settlement of labor disputes, is more akin to the doctrine of waiver. . . ." *Confectionery and Tobacco Drivers and Warehousemen's Union v. N.L.R.B., supra,* 312 F.2d at 113. In the interests of industrial peace, the condonation doctrine "prohibits an employer from misleadingly agreeing to return its employees to work and then taking disciplinary action for something apparently forgiven." *Packers Hide Association v. N.L.R.B.*, 360 F.2d 59, 62 (C.A. 8, 1966). Here, the strikers returned to work without precondition. Lasaponara and Fazzino were still in total charge for two weeks following the strike, prior to the transfer of stock ownership, and made no move to discharge them. In fact, when the new owner, two months after the strike, decided to discharge the strikers and instructed Fazzino to do so, Fazzino at first had no idea why the action was taking place (A. 21, 32, n. 30; 131). Thus, the employees were misled and lulled into a false sense of security by the Company's two-month silence; moreover, it is not unreasonable to consider the Company's permitting the employees to continue working for such an extended duration as clear and convincing evidence that it had forgiven the asserted misconduct. In the cases relied upon by the Company, on the other hand, the employees were

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IV. SUBSTANTIAL EVIDENCE ON THE RECORD TAKEN AS A WHOLE SUPPORTS THE BOARD'S FINDING THAT THE COMPANY VIOLATED SECTION 8(a)(3) AND (1) OF THE ACT BY REFUSING TO REHIRE MURACA BECAUSE OF UNION ACTIVITIES.

It has been established law for more than thirty years that a refusal to hire someone because of union activity is violative of Section 8(a)(3) and (1) of the Act. *Phelps-Dodge Corp. v. N.L.R.B.*, 313 U.S. 177, 181-187 (1941); *Marlin-Rockwell Corp. v. N.L.R.B.*, 133 F.2d 258, 260 (C.A. 2, 1943); *Amalgamated Clothing Workers v. N.L.R.B.*, 302 F.2d 186, 189-190 (C.A.D.C., 1962).

Here, Muraca testified without contradiction that when he heard that the Company was hiring people, he went to Fazzino and asked for a job. Fazzino confirmed that the Company needed people, but told Muraca that he (Muraca) would have to wait "until this union thing gets settled . . . [because] you got me in trouble" with the National Labor Relations Board (A. 26-27; 112-113). Fazzino promised to call Muraca, but did not; and when Muraca called again, Fazzino informed him that any action concerning him would have to be cleared with Oddi. These statements, combined with Muraca's membership in December on the union committee and Fazzino's January allegation that Muraca had started the Union, gave the Board ample cause to conclude that Muraca was denied rehire because of his union activities. See *N.L.R.B. v. Shawnee Industries, Inc.*, 333 F.2d 221, 223-224 (C.A. 10, 1964) (prior union involvement found to be basis for refusal to hire, where another person was hired because he " 'wasn't

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6 (continued) not misled. For example, in *N.L.R.B. v. Marshall Car Wheel & Foundry Co., supra,* 218 F.2d at 411-412, the employer promptly told the wildcat strikers that it considered them as having quit their jobs and that they would be allowed to return only if the foreman approved and then only in the status of new employees.

mixed up in the union squabble' "). Indeed, the statement by Fazzino that the reason Muraca could not be hired was the fact that he had gotten Fazzino in trouble with the Labor Board was "an outright confession of an unlawful discrimination." *N.L.R.B. v. L.C. Ferguson,* 257 F.2d 88, 92 (C.A. 5, 1958).

Finally, the fact that Muraca may have been terminated for good cause in January did not mean that the Board was barred from concluding, on this record, that the "real reason" for the failure to rehire in May and June was "union sympath[y] and activit[y]." *Marlin-Rockwell Corp. v. N.L.R.B., supra,* 133 F.2d at 260. Cf., *Dubin-Haskell Lining Corp. v. N.L.R.B.,* 386 F.2d 306, 308 (C.A. 4, 1967) *(in banc); N.L.R.B. v. Whitfield Pickle Co.,* 374 F.2d 576, 579, 582-583 (C.A. 5, 1967) (employee discharged for cause, but refusal to rehire based on pursuit of unfair labor practice charge was unlawful).

CONCLUSION

For the foregoing reasons, we respectfully request that the Court enter a judgment enforcing the Board's order in full.

JOHN S. IRVING,
General Counsel,

JOHN E. HIGGINS, JR.,
Deputy General Counsel,

ELLIOTT MOORE,
Deputy Associate General Counsel,

National Labor Relations Board.

JOHN H. FERGUSON,
DAVID S. FISHBACK,
Attorneys,

National Labor Relations Board.
Washington, D.C. 20570

February, 1976.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

NATIONAL LABOR RELATIONS BOARD, Petitioner,	)	
v.	)	No. 75-4215
A. LASAPONARA & SONS, INC., A WHOLLY OWNED SUBSIDIARY OF ERE INDUSTRIES, INC. AND ERE INDUSTRIES, INC., Respondent.	)	

CERTIFICATE OF SERVICE

The undersigned certifies that three (3) copies of the Board's offset printed brief in the above-captioned case have this day been served by first class mail upon the following counsel at the address listed below:

Farmer, Shibley, McGuinn & Flood
Att: Guy Farmer, Esquire
1120 Connecticut Ave., N.W.
Washington, D. C. 20036

Elliott Moore
/s/ Elliott Moore
Elliott Moore
Deputy Associate General Counsel
NATIONAL LABOR RELATIONS BOARD

Dated at Washington, D. C.

this 23rd day of February, 1976.